

DISCUSSION KICK-OFF

Is the Islamic State a State?

RALPH JANIK — 10 June, 2016



The so-called Islamic State has triggered a wave of commentary ever since it emerged as one of the leading military groups in Syria and further captured vast parts of Iraqi territory in mid-2014. What seems to have received only little attention this far is its legal characterization.

To clear things up at the outset: The Islamic State is generally not seen a state in the sense of (international) law. Little agreement exists on the grounds upon which this characterisation is denied, however – rather, it seems that this question has been taken for granted. Since it can be said that entities like the Islamic State ultimately challenge the traditional thinking on statehood and a few words on its legal personality are thus warranted.

Statehood in International Law

Given the flexibility often used in the establishment of states, an *advocatus diaboli* could certainly argue that the Islamic State fulfils the traditional elements of statehood (permanent population, territory, and government).

While the people living under its rule are sometimes described as quasi-hostages (one certainly also needs to mention the gross human rights abuses committed against minorities here; a UN report even spoke of genocide against the Yezidis), there seems to enjoy a certain level of support among the Sunni majority. It must also not be forgotten that the current alternatives – the Shia-dominated government in Iraq or the various Kurdish groups – are highly unpopular. In any case, the requirement of a permanent population does not allow for a restrictive interpretation since the colonization process has ultimately led to the establishment of a great number of states populated by people without a far-reaching sense of unity or solidarity.

The requirement of a defined territory does, as the examples of Albania's admission to the League of Nations in 1920 or Israel's membership in the UN show, not necessarily require universally accepted borders but merely effective control over a certain key area. The Islamic State has, despite its significant territorial losses in Iraq after the start of the allied bombing campaign, been exercising effective control over a certain core territory already before it had declared the restoration of the Caliphate in June 2014. The remaining question is whether it lacks permanence. In this regard, it must not be forgotten that many states were recognized immediately after their declaration of independence during the de-colonisation period. In addition, US president Barack

Obama has already made it clear that the fight against the Islamic State will take time.

Lastly, the Islamic State can definitely be said to have a government. It is independent from other states and maintains law and order while fulfilling all those functions usually associated with a state: A documentary by VICE News shows an elaborated administrative apparatus including a prison system, authorities doing their daily work, or police officers patrolling the streets. It also entertains social-welfare programs and even claims to issue its own gold coins in an attempt to bring back the gold standard.

It all comes down to recognition

Other factors such as a certain degree of civilization, minimal respect for human rights, or the willingness to adhere to international law (the latter was recently mentioned by Martti Koskenniemi) are not elements of statehood but rather play a role when determining whether to recognize an entity as a state. This leads us directly to the good old doctrinal debate between the declaratory theory and the constitutive theory.

Radical proponents of the declaratory theory have a hard time rejecting the Islamic State's character as a state. The declaratory theory ultimately means that even the most tyrannical regime can constitute a state regardless of whether it is recognized or not as soon as it fulfils the three criteria of statehood – all that matters it is *effectiveness*.

Arguing that the Islamic State does not have a territory or a population would require a restrictive application that runs counter to many historical examples of the establishment of states. From a strictly legal perspective, applying the

statehood-requirements differently depending on the political circumstances seems arbitrary. One possible solution is to require a higher standard of governance than mere effective control, i.e. that usually associated with the notion of good governance, in all cases. The remaining problem would be the question why this standard is applied in connection with newly emerging states only and not with long-established ones as well.

Hard cases like that of the Islamic State thus ultimately highlight the lasting importance of recognition. After all, is not recognized by any state and the Security Council has even passed a resolution (2249) calling for the eradication of its safe haven in Iraq and Syria. The international community has thus also taken decisive steps to prevent the Islamic State from coming into existence as a *legal entity*.

At the same time, a strict application of the constitutive theory is to be rejected, first and foremost since – absent universal recognition – one and the same entity could simultaneously constitute a state in the eyes of some and a non-state in the eyes of others.

The Islamic State thus shows that one needs to walk a middle path between these two theories (e.g. suggested by John Dugard, see *The Secession of States and Their Recognition in the Wake of Kosovo*) by qualifying the capacity to enter into relations with other states as an additional (fourth) element of statehood. A widely isolated entity with a permanent population, a certain territory, and a government would thus not be classified as a state. On the other hand, any entity may enjoy objective statehood (i.e. also towards non-recognizing states) if it is recognized by a certain number of states (the exact number is obviously difficult to determine). The status

of existing states, even although many of them fall short of good governance, is thus not affected. In theory, tyrannical regimes could also achieve statehood. In practice, however, criteria like the rule of law, observance of human rights, or a certain degree of representativeness – are usually taken into account when new states come into existence. Hence, the Islamic State neither currently constitutes a state nor would it be able to achieve statehood and all of the associated privileges in the future.

A reply to this post can be found [here](#).

ISSN 2510-2567

Tags: *Legitimacy, State recognition, Terrorism*



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